Appeal 15-232 Affirmed — Strong & Miller
Ordered for Reargument — Mr. Justice Davis
Argument — April 6th 1872
Continued.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~357.~~ [redacted] 21

THE PHILADELPHIA AND READING RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

FILED DECEMBER 8, 1870.

Dec. 7. 1872

SUPREME COURT OF THE UNITED STATES.

No. 357.

THE PHILADELPHIA AND READING RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEATH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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1 In the court of common pleas of Dauphin County, Pennsylvania

Among the records of the court of common pleas of Dauphin County, Penn'a, to April term, 1868, No. 586, it is contained as follows:

Docket entries.

Brewster.
Kunkel, Gowen, J. E. Lamberton.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE PHILADELPHIA AND READING RAILROAD Company.

Appeal by defendant from the settlement of the auditor general and State treasurer of Pennsylvania.

April 20, 1868. Appeal, specifications of objections, copy of account, and bond filed.

May 19, 1868. Narr. and copy of account filed.

June 2, 1868. Rule on defendant to plead on thirty days' notice or judgment, ex-rule.

2 June 3, 1868. Defendant pleads "nil debet."

November court, 1868. On issue list and continued.

January court, 1869. On issue list and continued.

March adjourned court, 1869. On issue list.

March 15, 1869. Trial ordered; jury called; come, &c. twelve good and lawful men of the county of Dauphin, duly selected, summoned, &c., who, being all sworn or affirmed, &c., according to law do say, (March 16, 1869,) that they find in favor of the plaintiff for fourteen thousand seven hundred and ninty-five $\frac{06}{100}$ dollars,) $14,795 06,) subject to the opinion of the court on reserved points.

May 3, 1869. Opinion of the court on reserved points filed, giving judgment in favor of the defendant.

May 7, 1869. Assignment of errors filed.

June 26, 1869. Writ of error from Supreme Court, received and filed.

Certified from the record. April 28, 1870.

SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN CO., PA.

JOS. H. NISSLEY,
Prothonotary.

3 In the court of common pleas of Dauphin County, Pennsylvania. April term, 1868.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE PHILADELPHIA AND READING RAILROAD Company. No. 586.

In the matter of the account, settled by the auditor general and State treasurer of the Commonwealth of Pennsylvania, between The Commonwealth of Pennsylvania and The Philadelphia and Reading Railroad Company, for tax claimed to be due to the said Commonwealth, for the

half year ending December 31, 1867, under the provisions of the act of the general assembly of the Commonwealth of Pennsylvania, approved the 23 day of February, 1866, entitled "An act to amend the revenue laws of the Commonwealth."

4 The said The Philadelphia and Reading Railroad Company appeal from the said settlement (a copy of which is hereto annexed) to the court of common pleas of Dauphin County, Pennsylvania, and specify the following objections to the said settlement:

First. The second section of the said act imposes a tax upon the gross receipts of the said company, without discriminating between receipts derived from the transportation of passengers and freight through Pennsylvania, in transit from a foreign country or another State, or in transit between points of receipt and delivery, one of which is beyond the limits of the State of Pennsylvania, as one class, and receipts derived from the transportation of passengers, and freight in transit between points of receipt and delivery, both of which are in Penn-

5 sylvania; and in thus taxing receipts of the first class, *i. e.* receipts derived from the transportation of passengers and freight through Pennsylvania, in transit from a foreign country or another State, or in transit between points of receipt and delivery, one of which is beyond the limits of the State of Pennsylvania, the said law is at variance with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, which gives to the Congress of the United States the power to regulate commerce with foreign nations, and among the several States; and with the second paragraph of the tenth section of the first article of the Constitution of the United States, which provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;

6 and it is for these and other reasons unconstitutional and void.

Second. By the said settlement The Philadelphia and Reading Railroad Company is charged, under the said second section of the act with a tax of thirteen thousand three hundred and sixty-nine dollars and three cents, being a tax of three-fourths of one per centum on one million seven hundred and eighty-two thousand five hundred and thirty-seven dollars and sixty cents, receipts from the transportation of coal carried to points without the State of Pennsylvania, the said tax of thirteen thousand three hundred and sixty-nine dollars and three cents thus charged being in violation of the provisions of the Constitution of the United States above cited, and the act imposing the same being, therefore, unconstitutional and void.

Third. The said act of February 23, 1866, is unconstitutional

7 and void to the extent that it imposes a tax upon receipts derived from the transportation of passenger and freight not both received and delivered within the State of Pennsylvania.

{ SEAL OF THE PHILADELPHIA AND READING R. R. CO. }

CHARLES E. SMITH,
President.

Attest:

W. W. WEBB,
Secretary.

COPY OF ACCOUNT.

Philadelphia and Reading Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts, per act of February 23, 1866, for half year ending December 31, 1867, as per report herewith filed:

Gross receipts	$4,739,829 93
Tax ¾ of one per cent	35,548 73
Due Commonwealth	$35,548 73

AUDITOR GENERAL'S OFFICE,
Harrisburg, March 25, 1868.

Settled and entered.

J. F. HARTRANFT,
Auditor General.

TREASURY OFFICE,
Harrisburg, March 25, 1868.

Approved.

M. H. TAGGART,
For W. A. KEMBLE,
State Treasurer.

Endorsed as follows:

Received at office of auditor general, April 18, 1868. Filed in Dauphin common pleas, April 20, 1868.

JOS. H. NISSLEY, *Clk.*

8 *Copy of bond of the Philadelphia and Reading Railroad Company, on appeal.*

Know all men by these presents that we, The Philadelphia and Reading Railroad Company and Charles E. Smith and Robert E. Cabeen, are held and firmly bound unto The Commonwealth of Pennsylvania in the sum of forty thousand dollars ($40,000) lawful money of the United States of America, to be paid to the said Commonwealth for the uses and intents and purposes declared and appointed by law; to which payment, well and truly to be made, we do bind ourselves, our successors, jointly and severally, firmly by these presents, sealed with the corporate seal of the said company and the seals of the said Charles E. Smith and Robert B. Cabeen, dated this 10th day of April, A. D. 1868.

Now, the condition of this obligation is such, that if the
9 above-bounden, The Philadelphia and Reading Railroad Company shall prosecute with effect their appeal from the settlement of their account with the said Commonwealth, as made by the auditor general and State treasurer thereof, on the 25 day of March, A. D. 1868, and shall pay all costs and charges which the court or arbitrators having jurisdiction to hear and determine the said appeal shall award against the said company, as well as any sum of money which shall appear by the judgment of the said court or the award of the said arbitrators to

be due by the said The Philadelphia and Reading Railroad Company to the said Commonwealth, then the foregoing obligation to be void; otherwise to be and remain in full force and effect.

SEAL OF THE PHILADELPHIA AND READING RAILROAD COMPANY.

CHARLES E. SMITH,
President.

Attest:

W. H. WEBB, *Secretary.*

Sealed and delivered in presence of us—
JA'S T. HUMPHREY,
W. S. STEPHENS,
Witnesses for CHARLES E. SMITH. [SEAL.]

A. A. KONIGMACHER,
J. T. KNIGHT,
Witnesses for ROB'T B. CABEEN. [SEAL.]

10 Endorsed as follows, to wit:

The within bond approved.

JNO. J. PEARSON,
President Judge.

APRIL 14, 1868.

Filed in Dauphin County common pleas, April 20, 1868.
JOS. H. NISSLEY,
Prothonotary.

11 *The Philadelphia and Reading Railroad Company in account with The Commonwealth of Pennsylvania, Dr.*

For tax on gross receipts, per act of February 23, 1866, for half year ending December 31, 1867, as per report herewith filed. Gross receipts, $4,739,829 93. Tax ¾ of one per cent	$35. 548 73
Due Commonwealth	$35, 548 73

AUDITOR GENERAL'S OFFICE,
Harrisburg, Mch 25, 1868.

Settled and entered.

J. F. HARTRANFT,
Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, March 25, 1868.

Approved.

M. H. TAGGART,
For W. H. KEMBLE,
State Treasurer.

AUDITOR GENERAL'S OFFICE,
Harrisburg, May 28, 1868.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office, the day and year aforesaid.

{ SEAL OF THE AUD. GEN'S OFFICE, PENNA. } J. F. HARTRANFT,
Auditor General.

12 In Dauphin County common pleas. No. 586. April term, 1868.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of The Philadelphia and Reading Railroad Company, of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars lawful money of the United States, which they owe to and unjustly detain from her. For that whereas the said defendants, on the 25th day of March, A. D. 1868, at the county of Dauphin aforesaid, were indebted to the said plaintiff, in the sum of thirty-five thousand five hundred and forty-eight $\frac{73}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general of this Commonwealth, and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon at the rate of twelve per centum per annum, from and after the expiration of one month from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, for tax on gross receipts as per act of February 23, 1866, for the year ending *first* December 31, A D. 1867, which said account was, on the 25 day of March, A. D. 1868, submitted to, revised, and approved by the State treasurer, and a copy thereof, within thirty days thereafter, sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and unappealed from. Whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth, in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, parcel of the said sum above demanded. And being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the last-mentioned sum of money:

And whereas, also, the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth, in the said account in the first count mentioned, for money then and there had and received by the said defendants, to and for the use of the said plaintiff. And also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general of this Commonwealth, against the said defendants, on the day and year in the first count mentioned, for tax on gross receipts, and approved by the State treasurer on the day and year in the first count mentioned.

And whereas, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request. Yet the said defendants have disregarded their said promises, and although often requested so to do have not as yet, paid any of the said several sums of money or any part thereof. To the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

JAMES W. M. NEWLIN, *Deputy Att'y Gen.*
For BENJAMIN HARRIS BREWSTER,
Attorney General.

(Endorsed as follows, to wit:) Narr. and copy of account, filed May 19, 1868. JOS. W. NISSLEY, *Prot'ry.*

13 In the court of common pleas of Dauphin County, Pennsylvania.
April T., 1868.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE PHILADELPHIA AND READING RAILROAD COMPANY. } No. 586.

And now, July 2, 1868, rule on defendant to plead on 30 days' notice or judgment.

J. W. M. NEWLIN,
Deputy Att'y Gen.

And now, July 3, 1868, the defendant pleads "nil debet."

J. C. KUNKEL,
Att'y for Defendant.

14 *Notes of evidence and charge of the court.*

In the court of common pleas of Dauphin County. April term, 1868.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE PHILADELPHIA AND READING RAILROAD COMPANY. } No. 586.

Appeal. Plea: "Nil debet."

J. M. Foster sworn: These are the returns of The Philadelphia and Reading Railroad Company, and also a copy of the settlement.

Statement of return read, dated March 13, 1868, prout the same, as follows, to wit:

15 *Philadelphia & Reading Railroad Company in account with The Commonwealth of Pennsylvania, Dr.*

For tax on gross receipts, per act of Febr. 23, 1866, for half year ending December 31, 1867, as p'r report herewith filed. Gross receipts, $4,739,829 93. Tax, three-fourths of one per cent	$35,548 73
Due Commonwealth	$35,548 73

AUDITOR GENERAL'S OFFICE,
Harrisburg, March 25th, 1868.

Settled and entered.

J. F. HARTRANFT,
Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, March 25th, 1868.

Approved and entered.

M. H. TAGGART,
Per W. H. KEMBLE,
State Treas.

AUDITOR'S GENERAL'S OFFICE,
Harrisburg, March 25th, 1868.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office the day and year aforesaid.

J. F. HARTRANFT,
Auditor Gen.

16 Settlement March 25th, 1868, shews due $35,548 73; paid, April 27, 1868, $22,179 69, all except tax on coal going out of the State; prout settlement read as follows, to wit:

17 Statement of the gross receipts of the Philadelphia and Reading Railroad and branches, upon which tax is due to the State of Pennsylvania, under act approved Febr. 23rd, 1866, including gross receipts of the Mill Creek and Mine Hill R. R., the Schuykill Valley R. R., the Mount Carbon R. R., the Mount Carbon and Port Carbon R. R., the Mahanoy & Broad Mountain R. R., the Little Schuylkill R. R., the East Mahanoy R. R., the Mine Hill R. R., the Lorberry Creek R. R., the Good Spring R. R., the Union R. R., the Chester Valley R. R., all of which are worked by the Philadelphia and Reading Railroad Company.

			Tax.
Gross receipts July 1, 1867, to Dec. 31, '67, exclusive of receipts on coal going to points without the State.....	$2,957,292 33	¾ %	$22,179 69
Receipts on coal going to points without the State.....	1,782,537 60	" "	13,369 03
Total	4,739,829 93		35,548 72

I certify that the above statement of the gross receipts of the Philad. and Reading R. R. Co. and the branches operated thereby, is true, to the best of my knowledge and belief.

Affirmed and subscribed before me, an alderman in and for the county of Philadelphia, this day of , 1868.

18 Letter read, dated March, 13, 1868, accompanying the report, prout the same, as follows, to wit:

18½ PHILADELPHIA & READING RAILROAD CO.,
OFFICE 227 SOUTH FOURTH ST.,
Philad'a, March 13th, 1868.

Hon. J. F. HARTRANFT,
Auditor General for the State of Penn'a, Harrisburg.

SIR: I have received your communication of the 11th inst., returning my report of the gross receipts of this company from July 1st, 1867, to Dec. 31st, 1867, exclusive of receipts on coal going to points without the State.

That report was made up in conformity with the views of our legal advisers, and which we trusted would be acceptable to you.

Since, however, you request that a report be made to you, shewing the entire amount of receipts from all sources, "with such discrimination as we think proper," I have now the honor to enclose a report for the period above-named, but must take exception to that portion of the report referring to receipts on coal going to points without the State, which portion is $1,782,537 60, and on which the tax, if admitted, would be $13,369 03.

I remain, very respectfully, yours,
(Signed) S. BRADFORD, *Treas.*

19 DEFENSE.

It is conceded by the attorney general that the gross receipts on $1,732,537 60 was charged on account of money paid for the transportation of freight, and originally intended to be carried out of the State of Pennsylvania, and contracted to be so carried at the time of payment of the freight and actually so carried.

The defendant raised two points in this case—

First. Is the portion of the tax imposed and attempted to be collected valid, under the facts proved and admitted on the trial, under the provisions of the Constitution of the United States?

Second. Is the law imposing the tax repealed by the sixteenth section of the act of May 1st, 1869; and if so, does that render the tax
20 invalid and irrecoverable?

The court instructed the jury against the defendant on both points, and directed them to find a verdict in favor of the Commonwealth for $14,795 06, amount of tax remaining unpaid, with interest thereon at the rate of 12 per cent. after one month from the date of settlement, and at requests of defendant's counsel sealed a bill of exceptions to the charge on both points, and also reserved them for the future consideration of the court.

JNO. J. PEARSON. [SEAL.]

21 *Opinion of the court on the points reserved, as above stated.*

It is admitted that the tax in controversy was imposed on the railroad company on account of money paid for the transportation of freight originally intended to be carried out of the State of Pennsylvania into other States or foreign countries, and contracted to be so carried at the time of payment, and actually transported beyond our borders. Does this tax come within the provisions of the second section of the act of February 23d, 1866, imposing a tax on the gross receipts of transportation companies? If it does, is the law invalid as to freight transported out of the State and intended so to be at the time of the affreightment and payment, on account of the third number of the eighth section of

the Federal Constitution, enabling Congress to regulate commerce with foreign nations, among the several States, and Indian tribes, or the second number of the tenth section, declaring that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the Treasury of the United States?" That the tax received on account of affreightment of goods under the circumstances described and admitted, is part of the "gross receipts" of this company, is too clear for argument. It comes within the very letter of the statute. Is it in effect an "impost or duty on imports or exports," or does it materially embarrass the commerce between the States? If neither the one nor the other, it comes within the inhibition of the Federal Constitution, and the State statute must give way to the higher national law. This court has had before it, and decided in The Commonwealth vs. The New York and Erie Railroad, the principle that a State cannot impose a tax by the ton, barrel, bushel, or other measure on goods on transit through the State from and to points beyond our lines—that such a tax interferes with and embarrasses the commerce between the States, and if permitted, may amount to a prohibition of that free intercourse intended to be secured by the Constitution of the United States.

We also held, in the case of The Commonwealth vs. The Delaware, Lackawanna and Western Railroad, that goods originally freighted in this State, under a contract to be carried to the market of a neighboring State, were not subject to a tax imposed by Pennsylvania on the transporting company, and that the same rule prevails in regard to commodities shipped from other States into our own. Such a law was substantially a "duty on imports and exports," and in effect, a "regulation of commerce between the States."

Both of these decisions were acquiesced in by the then attorney general, Mr. Meredith, who sued out writs of error, but permitted them to be non prossed, on the ground that the decisions were right. We have since decided the same principle in The Commonwealth vs. The Philadelphia and Reading Railroad Company, so that the doctrine must be considered settled, so far as regards this court, until overturned by the Supreme Court of the United States, the tribunal which must finally
22 determine every question arising under the Federal Constitution.

Those cases were all examined with great care, and the authorities fully investigated. The only question remaining open for our consideration is, whether a tax on the money paid for the freight of goods, thus to be transported, is substantially the same as a tax on the goods, and comes within the constitutional prohibition. It is very clear that the law looks beyond mere words to things, to substantial effects, and it is said by Mr. Justice Grier, in the passenger cases, (7 Howard, p. 458,) "The true character of the law cannot be changed by its collocation. A State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it by the the number of masts, or of the mariners, or the size and power of the engines." The great object of the constitutional provision giving Congress the power to regulate commerce between the States, was to prevent the States from embarrassing the intercourse which it was intended should freely exist between those bodies designed to be united for many purposes into one nation, with equal rights and privileges conferred

upon all. If any one could tax the commodities carried, it could exclude their passage through the States or across its lines. Is not a tax imposed on the amount of freight received by a transportation company the same in effect as one charged against the article carried? If the State can charge three-fourths of one per cent. on the money paid for freight, it can charge fifty per cent. on all money received, and although it can undoubtedly tax its own citizens, who are represented in its legislative bodies to any extent that the law-maker may see proper, it cannot thus increase the price of transportation to the people of other States. That the tax on imposts need not be directly laid on foreign commerce in order to come within the constitutional prohibition, is sufficiently shown by Brown vs. The State of Maryland, 12 Wheaton, 419, where the importer, who sold by the bale or package, was required to pay the State a license to sell; and perhaps still more clearly in Almy vs. The State of California, 24 Howard, 169, where a tax was imposed on the bill of lading of all gold or silver exported from that State. In that
23 case, Chief Justice Taney says: "If the tax was directly laid on articles exported, it would be a duty obvious to every one, and the bill of lading is necessary evidence of the export of the commodity. That, certainly, is not so directly an impost as a tax levied on the freight paid for its carriage. In Crandall vs. The State of Nevada, 6 Wallace, 35, the tax was assessed on every stage or railroad company for each passenger carried to and from the State, and held to be unconstitutional. It cut off, and measurably prevented that free intercourse which should exist between the States, and be secured to every citizen thereof, yet there, as in the "passenger cases," in 7 Howard, the tax was not imposed on the citizen traveling, but on the company carrying him, and perhaps the law would have been equally invalid, had it been assessed on the way-bill usually accompanying the stage coach or the ticket sold by the railroad company. So a law of a State authorizing the wardens of a port to demand five dollars for each vessel arriving in port, whether called on to perform any service for it or not, was in effect a regulation of commerce, and, therefore, void. Steamship Company vs. Port Wardens, 6 Wallace, 31.

In the State of Louisiana vs. Kennedy & Co., 19 Louisiana Reports, 397, the doctrine of Brown vs. The State of Maryland is fully recognized as binding authority, and is applied to sales by the package, or in bulk, from the neighboring States; and it was held that an agent or commission merchant, domiciled in that State, receiving property on consignment from another State, to sell on commission, could not be taxed on the amount of the gross sales made of the goods in the original form of package, where he accounted to the owner (a non-resident) for the price obtained, less his commission.

Again, in the State of California vs. Raymond, 34 California Reports, 492, it was held by the supreme court of that State, that "Commerce," within the Federal Constitution, means intercourse, and its regulation applies with the same force to the transportation of passengers, as goods; that a State cannot accomplish that indirectly which it is prohibited from doing directly; therefore, it cannot require stamps to be purchased from the State to be placed on the contract for passage, and to be paid by the passenger. That is a regulation of commerce
24 within the meaning of the Federal Constitution, and the law is void. If that case be sound, and it is but a reiteration of what has been frequently declared by the United States judiciary, it is strongly parallel to the present.

Some years since a similar conclusion was reached by the supreme

court of Missouri, 27 Missouri Reports, 464, and by a parity of reasoning. The substance and object of the Federal Constitution is there carefully considered, and the judge who delivered the opinion says: "It would be a bold proposition to say that the States of this Union have concurrent power with the United States to regulate commerce."

It is true, in that case the State, by its license laws, undertook to discriminate against the manufactures of certain other States, but the cause is not decided on that principle, but on the broad doctrine that no State has power to regulate or embarrass the commercial intercourse between the States. The court of appeals, in New Jersey, fully recognized and established the same doctrine. (See Law Register of 1865, p. 238.) Thus, whether we look to the decisions of the State or Federal judiciary, there appears to have been an almost perfect unanimity of opinion that the commerce between the States can be regulated by Congress alone; that the States can neither regulate tax nor embarrass the commercial intercourse between the States, any more than they can that with foreign countries; and cannot do that indirectly by taxation which they are prohibited from doing directly. And we are unable to see the distinction in substance and effect between a tax imposed by a State on the commodity carried, and a similar sum levied on the price received for its transportation. It is true, as said by Chief Justice Taney, in 24 Howard, 169, when the tax is assessed on the article itself it is a little more apparent and visible, but the effect is the same.

Occasionally some of the Federal judges, who are strongly tinctured with the mania of "State rights," have declared that as the Federal Government has not regulated commerce between the States it may be done by the States themselves, as independent sovereignties; in fact, that being sovereign States, they cannot be limited to their power of taxation; forgetting, as it seems to us, that they are not sovereign, but have surrendered a large portion of their power to the Federal
25 Government. Such a course of reasoning always mystifies the subject in abstractions, leading to no practical result, and the reasoner generally finds himself befogged in a labyrinth of metaphysics. It would be rather startling doctrine to urge that if Congress should repeal all its duties the States around the sea-board might raise an unlimited amount of revenue, by imposing imposts on imports. Such a course would defeat one of the main objects in forming the Federal Constitution. We are clearly of the opinion that the States possess no such power, and if they cannot regulate commerce with foreign nations, they cannot among the several States, as the same words are used in the Constitution as to both foreign and domestic trade.

It is contended, however, that this tax may be supported as imposed on the franchises of the company, and to show that such power exists in the States over corporations of their own creation, although the tax levied falls on matters otherwise free. We are referred to the decisions of the United States Supreme Court, in Savings Society vs. Coite, 6 Wallace, 594, and Provident Institution vs. Massachusetts, idem, p. 611. But it must be borne in mind that the only question raised in those cases, related to the profits derived from the interest on United States bonds, ordinarily exempt from taxation, and concerned the corporations alone. Here the tax falls on the moneys collected from all persons traveling or receiving goods of any kind transported by railroad. The validity of the tax is not questioned for the benefit of the transporter, but for the citizens of other States, whose persons or goods are carried, and as interfering with the free commerce between the States. If a duty on foreign or domestic commodities could be reached through a tax on

franchises, what is to prevent the State of New York from creating steamship companies, and afterwards laying an impost on every ton of goods, or on every passenger brought in from foreign countries? No one questions the right of Pennsylvania to tax the corporations of her own creation to any extent she may consider expedient, on the business done within the State, however unjustly it may operate. The intra-territorial business does not come within the prohibition of the Federal Constitution. But when the attempt is to raise money out of the foreign or domestic commerce of the country beyond the lines of the States, it trespasses on the rights of others, and cannot be allowed,
26 whether the tax be imposed on the passenger, the goods, or the money paid for freight or passage.

It is scarcely necessary or even expedient for the court to show the injustice of this system of taxation towards other States, or the corporations of their own creation; for if the law be not inconsistent with the Constitution of the United States, or that of our own State, it must be sustained and enforced. We have nothing in our constitution, as is the case with many of the States, providing "that all taxes shall be just and equal." The Philadelphia and Reading Railroad Company is scarcely a fair example of the unjust operation of this tax, as the main stem and all of its branches commence and terminate in Pennsylvania. But take the Pittsburg, Fort Wayne and Chicago Railroad and consider its effect. That road commences in Pittsburg, runs about fifty miles in Pennsylvania, probably three hundred in Ohio, an equal distance through Indiana, and perhaps fifty miles in Illinois. Nearly all of the freight and passage money going west is paid in Pittsburg, or before it reaches that point; but there it is received by the company. Shall the corporation created by four States pay a tax on the gross receipts for all of its western freight and passengers to Pennsylvania, over its seven hundred miles of road, when but fifty is traveled in this State? And, under similar law, shall Illinois receive a like tax on all freight and passengers carried east? Such system of taxation would soon lead to retaliatory measures on the part of Ohio and Indiana, and thus the commerce and friendly intercourse between the several States be embarrassed or broken up.

The road spoken of, by way of example, is only one of many leading out of Pennsylvania.

We are, therefore, of the opinion—

I. That a railroad company may be constitutionally taxed for all persons or property transported within the State, but cannot for any originally destined for other States or foreign countries, and actually so carried.

II. That the sums paid for transportation stand in like situation, and the tax on gross receipts is only another method of reaching the same object indirectly, by levying the tax on the money paid for freight or passage instead of laying it on the passengers or goods.

III. A tax on the net earning of a railroad company created by our own laws, so far as the road is situated within the State, would not be a violation of the Federal Constitution, but be properly considered a tax on the capital stock, or the value of the road.

The court gives judgment in favor of the defendant on the first point reserved, which renders a decision of the second unnecessary.

To this decision on the reserved points the counsel for the State did except, and exception sealed at the request of the attorney general.

JOHN J. PEARSON. [SEAL.]

(Indorsed as follows:) Opinion of the court on the reserved points filed May 3, 1869.

JOS. H. NISSLEY, *Prot'ry.*

27 *Assignments of error.*

In the court of common pleas of Dauphin county. April term, 1868.

THE COMMONWEALTH OF PENNSYLVANIA *vs.* THE PHILADELPHIA AND READING RAILroad Company. } No. 586.

The Commonwealth excepts to the charge of the learned judge in above suit, and files the following assignments of error:

First. The court erred in charging that the tax imposed by the act of 23d April, 1866, on the gross receipts of a corporation was void as a regulation of commerce between the States, so far as it applied to that portion of the gross receipts received from goods going beyond the State.

Second. The court erred in charging that the tax was not imposed on the franchise and business of the defendants.

Third. The court erred in charging that the tax imposed by the act of 23d April, 1866, was virtually a tax on the goods carried, and not on the carrier.

LEWIS WALN SMITH,
Deputy Att'y Gen.
For BENJAMIN HARRIS BREWSTER,
Att'y Gen. Pa.

(Endorsed as follows:) Filed May 7, 1869. Jos. H. Nissley, prot'ry.

28 In the supreme court of Pennsylvania in and for the middle district.

Precipe for writ of error.

In Dauphim County common pleas. April term, 1868.

THE COMMONWEALTH OF PENNSYLVANIA, plaintiff in error, *vs.* THE PHILADELPHIA AND READING RAILroad Company, defendant in error. } No. 586.

Issue writ of error to court of common pleas of Dauphin County in the above suit, at the instance of the plaintiff in error, returnable 3d Monday of May, 1869.

LEWIS WALN SMITH,
Dep. Att'y Gen.
For B. H. BREWSTER,
Att'y Gen.

To W. DE WITT, *Proth'y*

(Endorsed as follows:) Filed in supreme court May 4, 1869. Wallace De Witt, prothonotary.

29 In the supreme court of Pennsylvania in and for the middle district, sct.:

{ SEAL OF THE SUPREME COURT OF PENNSYLVANIA—DEED SEAL. } The Commonwealth of Pennsylvania, to the justices of the court of common pleas, for the county of Dauphin, greeting:

Because, in the record and process, and in rendering the judgment in a certain plaint, which was in our said court before the judges of the same court, by our writ, between The Commonwealth of Pennsylvania, plaintiff in error, and The Philadelphia and Reading Railroad Company, defendant in error, as it is said, manifest error hath intervened to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error, we have received information: We, willing that if any error be therein it should be corrected, and that speedy justice be done to the parties in this part, do command you that, if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the third Monday of May next, and this writ; that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable James Thompson, chief justice of our said supreme court, at Harrisburg, the 6th day of May, in the year of our Lord one thousand eight hundred and 69, and of the Commonwealth the 92.

Allowed:

WALLACE DE WITT,
Prothonotary.

The record and process, and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

[L. S.] JNO. J. PEARSON,
President Judge.

(Indorsed:) No. 113. May term, 1869. Supreme court of Pennsylvania, middle district. The Commonwealth of Pennsylvania, plaintiff in error, vs. The Philadelphia and Reading Railroad Co., defendant in error. Writ of error to the court of common pleas for the county of Dauphin. Returnable the 3d Monday of May, 1869. Rule on the defendant in error to appear and plead on the return day of the writ.

"N. B.—20 days' notice to the parties or their counsel below is necessary to compel an appearance."

W. DE WITT, *Proth'y.*

Filed in Dauphin common pleas, June 26, 1869.

JOS. H. NISSLEY, *Proth'y.*

30 In the supreme court of Pennsylvania in and for the middle district.

At a supreme court of the State of Pennsylvania in and for the middle district, begun and held at the city of Harrisburg, on the first Monday of May, A. D. 1869—present, the Honorable James Thompson,

chief justice of supreme court of Pennsylvania; John M. Read, Daniel Agnew, George Sharswood, and Henry W. Williams, justices, and Wallace De Witt, prothonotary—among the records of the said supreme court of Pennsylvania in and for the middle district, to May term, is contained as follows, to wit:

Writ of error to court of common pleas of Dauphin County.

THE COMMONWEATH OF PENNSYLVANIA, plaintiff in error, plaintiff below,
vs.
THE PHILADELPHA AND READING RAILroad Company, defendant in error, defendant below.
} Of May term, 1869. No. 113.

31 *Docket entries.*

Precipe for writ of error to court of common pleas of Dauphin County, filed May 4, 1869.

Writ of error to court of common pleas of *of* Dauphin County, issued May 6, 1869.

Continued till next term, May 17, 1869.

Writ of error returned with record from the court of common pleas of Dauphin County, and filed May 16, 1870.

And now, to wit, May 24, 1870, this cause came on to be heard, and, on due consideration, it is ordered that the judgment of the court below be reversed, and that judgment be entered for the Commonwealth on the verdict, with interest and costs, the court being of opinion that the second section of the act of the general assembly of the Commonwealth of Pennsylvania, approved the 23d day of February, 1866, entitled "An act to amend the revenue laws of this Commonwealth," in its appli-
32 cation to the "gross receipts" of the defendant in error for the recovery of the tax on which the suit was brought, is not in conflict with the clause of the Constitution of the United States, which provides that "The Congress shall have power to regulate commerce with foreign nations among the several States, and with the Indian tribes," nor with the clause which provides that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except which may be absolutely necessary for executing its inspection laws," and is in all respects constitutional and valid.

THOMPSON, *C. J.*

May 31, 1870. Petition for writ of error to the Supreme Court of the United States.

Citation and writ of error from the Supreme Court of the United States, allowed by W. Strong, justice of the U. S. S. C., and bond in the sum of thirty thousand dollars, approved by W. Strong, asso-
33 ciate justice U. S. S. C. filed; and same day a copy *copy* of the writ of error from the Supreme Court of the United States for the defendant in error received and filed.

July 16, 1870. Service of citation accepted by the attorney general, and copy of writ of error from Supreme Court of the United States received by him.

Certified from the record.

{ SEAL OF THE SUPREME COURT OF PENNSYLVANIA. }

WALLACE DE WITT,
Prothonotary.

OCT. 29, 1870.

34 In the supreme court of Pennsylvania in and for the middle district, ss.

And now here, on this day, to wit, the 31 day of May, A. D. 1870, the said The Philadelphia and Reading Railroad Company produced to the said supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises commanding the record and proceedings aforesaid, of the judgment aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next; which writ of error is in the words and of tenor following, to wit:

35 UNITED STATES,
Eastern District of Pennsylvania, sct:

The President of the United States to the judges of the supreme court of the State of Pennsylvania, the highest court of law or equity in the said State, greeting:

Because that, in the record and process, and also in the rendering of judgment in a suit before you, between The State of Pennsylvaia, plaintiff in error, and The Philadelphia and Reading Railroad Company, a corporation of the said State, defendant in error, (No. 113 of the May term, 1869, of the middle district ot Pennsylvania,) in which said suit the validity of a statute of the State of Pennsylvania, on the ground of repugnancy to the Constitution of the United States, is said to have been drawn in question, and the decision to have been in favor of the said statute, a manifest error has intervened, to the great damage of the said defendant in error, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all

36 things concerning them, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held, that, the record and process aforesaid being inspected, the said Supreme Court may cause to be done therein what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this thirty-first day of May, A. D. one thousand eight hundred and seventy, and in the ninety-fourth year of the independence of the said United States.

[SEAL.] JAMES BELL,
Clk C. C. U. S.

Allowed by—

W. STRONG,
Ass. Jus. S. C. U.S.

I acknowledge to have received a true copy of this writ of error and I request that my appearance be entered for the defendant in error.

F. CARROLL BREWSTER,
Attorney General of Pennsylvania.

JUNE 7, 1870.

Indorsed:) No. 31. April sess., 1870. The Philadelphia and Reading Railroad Company, plaintiff in error, v. The State of Pennsylvania, defendant in error. Writ of error from the Supreme Court of the United States to the supreme court of Pennsylvania. (S. C. of Pa. May T, 1869. No. 113.) Filed sup. c't Pa., May 31, 1870. Wallace De Witt, proth'y S. C. Pa.

37 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings, with all things relating to the same, together with the said writ of error, are hereby transmitted to the Supreme Court accordingly.

38 *Copy of writ of error bond.*

Know all men by these presents that The Philadelphia and Reading Railroad Company, Franklin B. Gowen and A. E. Borie, are held and firmly bound unto The State of Pennsylvania in the sum of thirty thousand dollars, to be paid to the said State, its certain attorney or assigns; to which payment, well and truly to be made, the said Philadelphia and Reading Railroad Company hereby bind' itself, and the said Franklin B. Gowen and A. E. Borie do hereby bind themselves, their heirs, executors, and administrators, jointly and severally, by these presents, sealed with the corporate seal of the said company, and the seals of the said Franklin B. Gowen and A. E. Borie, this 31st day of May, A. D. 1870.

Whereas the said Philadelphia and Reading Railroad Company has sued out a writ of error from the Supreme Court of the United States to reverse a judgment rendered in a suit in the supreme court of Pennsylvania, wherein the said The State of Pennsylvania was plaintiff in error, and the said Philadelphia and Reading Railroad Company was
39 defendant in error, the said suit being No. 113 of the May term, 1869, of the said supreme court for the middle district of Pennsylvania: Now the condition of the above obligation is such, that if the said Philadelphia and Reading Railroad Company, the plaintiff in error as aforesaid, shall prosecute the said writ of error with effect, and answer all damages and costs if it shall fail to make good its plea, then the above obligation shall be void; but otherwise shall remain in full force and virtue.

FRANKLIN B. GOWEN,
President.

{SEAL OF THE PHIL'D. & READING R. R. CO.} Attest:

W. H. WEBB, *Secretary.*
FRANKLIN B. GOWEN. [L. S.]
A. E. BORIE. [L. S.]

Signed, sealed, and delivered in presence of us—
J. T. HUMPHREY.

Endorsed as follows:
Bond and sureties approved.

W. STRONG,
Associate Justice S. C. U. S.

Filed in supreme court of Pa. May 31, 1870.
WALLACE DE WITT,
Proth'y.

40 The United States of America to the State of Pennsylvania greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error issued from the Supreme Court of the United States to the supreme court of Pennsylvania, wherein The Philadelphia and Reading Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, viz, in a suit No. 113 of the May term, 1869, (middle district) of the said supreme court of Pennsylvania, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Strong, one of the associate judges of the Supreme Court of the United States, this first day of June, A. D. 1870.

W. STRONG,
Ass. Jus. S. C. U. S.

41 I accept service for defendant in error.

F. CARROLL BREWSTER,
Att'y General of Penn'a.

JUNE 16, 1870.

42 In testimony that the aforegoing pages from one to forty-two, inclusive, is a true copy and correct transcript taken from the record, and all proceedings of the supreme court of Pennsylvania, the highest court of law or equity of the State of Pennsylvania, in the case of The Commonwealth of Pennsylvania, plaintiff in error, and The Philadelphia and Reading Railroad Company, defendant in error, No. 113 May term, 1869, and all papers filed and attached to said record, I have hereunto subscribed my name and the seal of the said supreme court affixed, this 29 day of October, A. D. 1870.

[SEAL.] WALLACE DE WITT.
Prothonotary of the Supreme Court of Pennsylvania for the Middle District.

(Indorsement on cover:) No. 357. The Philadelphia and Reading Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania. Pennsylvania sup. court. Filed 8th December, 1870.

IN THE SUPREME COURT OF THE UNITED STATES.

Writ of Error to the Supreme Court of Pennsylvania.

THE PHILADELPHIA AND READING RAILROAD COMPANY,

PLAINTIFF IN ERROR.

vs.

THE COMMONWEALTH OF PENNA.,

DEFENDANT IN ERROR.

PAPER BOOK OF THE PLAINTIFF IN ERROR.

THE LEISENRING PRINTING HOUSE, 237 & 239 DOCK ST., PHILADELPHIA.

In the Supreme Court of the United States.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

The Philadelphia and Reading Railroad Company, Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania, Defendant in Error.

December Term, 1870.
No. 357.

PAPER BOOK OF THE PLAINTIFF IN ERROR.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State of Pennsylvania, which was alleged to be repugnant to the Constitution of the United States.

ABSTRACT OF THE CASE.

On the twenty-third day of February, 1866, the Legislature of Pennsylvania passed an act entitled "An act to amend the revenue laws of the Commonwealth," the second section of which is as follows:—

"In addition to the taxes now provided for by law, every railroad, canal and transportation company incorporated under

the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually, upon the first days of July and January, commencing on the first day of July, 1866; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of said company, to transmit to the Auditor General, at the dates aforesaid, a statement, under oath or affirmation, of the amount of gross receipts of the said company during the preceding six months; and if such company shall refuse or fail, for a period of thirty days after such tax becomes due, to make said return or to pay the same, the amount thereof, with an addition of ten (10) per centum thereto, shall be collected for the use of the Commonwealth, as other taxes are recoverable by law from said companies." (Act February 23d, 1866, sec. 2; Purd. Dig. Supl., page 1445, pl. 2.)

By the second section of an act approved the nineteenth day of July, 1866, entitled "A supplement to an act entitled 'An act to amend the revenue laws of this Commonwealth,' approved February twenty-third, one thousand eight hundred and sixty-six," (Pamphlet Laws of 1867, page 1863; Brightly's Purdon, page 1479, pl. 4,) it was provided that the section of the act of 1866, just quoted, should "be construed to apply to all railroad, canal and transportation companies not liable to taxation upon net income, in pursuance of the second section of the act of thirtieth April, Anno Domini one thousand eight hundred and sixty-four, entitled 'An act imposing additional taxes for State purposes, and to abolish the revenue board;'" thus rendering it clear, that *railroad, canal and transportation companies*, generally, were meant to be taxed on their *gross receipts*, since the second section of the act of April 30th, 1864, (Pamphlet Laws of 1864, page 218; Brightly's Purdon, page 1377, pl. 2,) imposed a tax "on the net earnings or income" of other companies than those liable to a tonnage tax on transportation, in which latter class railroad, canal and other transportation companies were included.

Under this state of the law, the Auditor General and State Treasurer of Pennsylvania stated an account between the Commonwealth and the Philadelphia and Reading Railroad Company, "for tax on gross receipts, per act of February 23d, 1866, for half year ending December 31st, 1867, by which the company was charged as follows:—

"Gross receipts, ...	$4,739,829 33
"Tax, ¾ of one per cent., . . .	35,548 73
"Due Commonwealth, . .	$35,548 73"

This account was based on returns made by the company, which discriminated between receipts from freight transported to points within, and receipts from freight exported to points without, the State of Pennsylvania. The latter, amounting to $1,782,537.60, were returned under protest against their liability to taxation. The tax assessed against these receipts amounts to $13,369.03, and forms the subject of the present controversy; the balance, $22,179.69, having been paid without objection.

The railroad company appealed from this settlement to the Court of Common Pleas of Dauphin county, Pennsylvania, the appeal being taken under the provisions of the eleventh section of the act of March 30th, 1811, (Brightly's Purdon, page 822, pl. 20,) and being accompanied by a specification of the objections on which it was founded, as required by the act referred to.

These objections alleged that the act of February 23d, 1866, so far as it taxed receipts from the transportation of freight and passengers through Pennsylvania, or in transit between points of receipt and delivery,—one of which was beyond the limits of Pennsylvania,—was unconstitutional and void, because, among other reasons, it was in conflict with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, (which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States,") and with the second paragraph of the tenth section of same article (which provides that "no State shall, without the

consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws)."

The appeal was tried on an issue joined on a plea of *nil debet* to a common-law declaration in debt, (see printed record, pages 5 and 6,) and resulted in a verdict for the plaintiff (the Commonwealth).

It was admitted on the trial, "that the tax was charged on account of money paid for the transportation of freight originally intended to be carried out of the State of Pennsylvania into other States or foreign countries, and contracted to be so carried at the time of payment, and actually transported beyond our borders" (see printed record, page 8); "and the defendant raised two points:—

"*First.*—Is the portion of the tax imposed, and attempted to be collected, valid, under the facts proved and admitted on the trial, under the provisions of the Constitution of the United States?

"*Second.*—Is the law imposing the tax repealed by the sixteenth section of the act of May 1st, 1869 (should be 1868); and, if so, does that render the tax invalid and irrecoverable?" (Printed record, p. 8.)

Afterwards, the court entered judgment for the defendants on the first point reserved, (see printed record, p. 13,) whereupon the Commonwealth excepted to the charge, (*i. e.*, opinion on the point reserved,) and filed the following assignments of error:—

"*First.*—The court erred in charging that the tax imposed by the act of 23d April, 1866, on the gross receipts of a corporation, was void as a regulation of commerce between the States, so far as it applied to that portion of the gross receipts received from goods going beyond the State.

"*Second.*—The court erred in charging that the tax was not imposed on the franchise and business of the defendants.

"*Third.*—The court erred in charging that the tax imposed by the act of 23d April, 1866, was virtually a tax on the goods

carried and not on the carrier," (printed record, p. 13,) and took a writ of error to the Supreme Court of the State of Pennsylvania.

The result of this writ was the reversal of the judgment of the court below, and the entry of judgment for the Commonwealth on the verdict; "the court being of opinion that the second section of the act of the General Assembly of the Commonwealth of Pennsylvania, approved the twenty-third day of February, 1866, entitled 'An act to amend the revenue laws of this Commonwealth,' in its application to the 'gross receipts' of the defendant in error for the recovery of the tax on which the suit is brought, is not in conflict with the clause of the Constitution of the United States which provides that 'the Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes;' nor with the clause which provides that 'no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' and is in all respects constitutional and valid." (Printed record, p. 15.)

The writ of error now before the court was taken to the judgment thus entered.

ASSIGNMENTS OF ERROR.

1. The court below erred in reversing the judgment of the Court of Common Pleas of Dauphin county, and in entering judgment for the Commonwealth of Pennsylvania on the verdict.

2. The court below erred in deciding that the second section of the act of the General Assembly of the Commonwealth of Pennsylvania, approved the 23d day of February, 1866, entitled "An act to amend the revenue laws of this Commonwealth," in its application to "gross receipts" of transportation companies derived from freight received for transportation, and actually transported, in a continuous course of transporta-

consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws)."

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tion, to points beyond the limits of the State, was not in conflict with the clause of the Constitution of the United States which provides that "the Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

3. The court below erred in deciding that the aforesaid act of Assembly, in its application to "gross receipts" of transportation companies, derived from freight received for transportation, and actually transported, in a continuous course of transportation, to points beyond the limits of the State, was not in conflict with the clause of the Constitution of the United States which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

4. The court below erred in deciding that the aforesaid act of Assembly, in its application to "gross receipts" of transportation companies, derived from freight received for transportation, and actually transported, in a continuous course of transportation, to points beyond the limits of the State, was, in all respects, constitutional and valid.

BRIEF OF ARGUMENT.

The argument of the plaintiffs in error will assume that a State tax upon transportation, generally, would be unconstitutional as applied to the transportation of merchandise from one State to another. That question is before the court on several writs of error now pending. If the decision in those cases should be inconsistent with this assumption, the plaintiffs in error have no case.

FIRST POINT.—*That there is no difference, in principle, between a transportation tax regulated by reference to the articles transported, and a transportation tax levied in the shape of a percentage of the money received for transportation.*

It would seem quite unreasonable to say that a tax of two cents per ton on the transportation of coal is unconstitutional, and yet that a tax of one per cent. on every two dollars (or two cents) paid for the transportation of coal would be constitutional.

If State taxation of inter-State commerce is forbidden, a tax on the transportation of a ton of freight from one State to another must be equally illegal, whether the sum to be paid is specially mentioned or is left to be ascertained by a simple arithmetical calculation.

"The great object of the constitutional provision giving Congress the power to regulate commerce between the States," said Judge Pearson, in his opinion in this case on the point reserved, (see printed record, page 9,) "was to prevent the States from embarrassing the intercourse which was intended should freely exist between these bodies, designed to be united for many purposes into one nation, with equal rights and privileges conferred upon all. If any one could tax the commodities carried, it could exclude their passage through the State or across its lines. Is not a tax imposed on the amount of freight received by a transportation company the same, in effect, as one charged against the article carried? If the State can charge three-fourths of one per cent. on the money paid for freight, it can charge fifty per cent. on all money received, and although it can undoubtedly tax its own citizens who are represented in its legislative bodies to any extent that the law-makers may see proper, it cannot thus increase the price of transportation to the people of other States."

SECOND POINT.—*That a tax upon the gross receipts of a transportation company is necessarily a tax upon transportation.*

In the Bank of Commerce *vs.* The Commissioners of Taxes, 2 Black, 620, it was held that United States securities held by a bank in New York as part of its capital, could not be constitutionally taxed under a law of that State which took the actual value of the entire capital stock as the basis of taxation,

although it was strongly urged that the United States securities were not specifically and *eo nomine* taxed; that no discrimination was made between them and other property; and that, in fact, the tax was upon the aggregate value of the property of the bank, irrespective of the character of the component parts of that property: but this court unanimously refused to admit that the law of New York did not tax United States loans, because the tax was imposed indiscriminately upon all the property of the bank.

So a tax upon the gross receipts of a company is, necessarily, a tax upon its receipts from transportation, or any other source; but, when the company is a transportation company, and the tax is chargeable upon the gross receipts of transportation companies only, it is plain that the tax was practically intended to be a tax on gross receipts from transportation, and on nothing else. The gross receipts of a transportation company must, in nearly every case, be receipts from transportation alone.

The Bank Tax case, 2 Wallace, 200, was but an affirmance of the principle on which the case in 2d Black was ruled. It was there held, that a tax on *a valuation equal to the amount of the capital stock of a bank, paid in, or secured to be paid in*, was really and substantially a tax upon that portion of the capital stock which consisted of the loans of the United States, notwithstanding it was strenuously urged that the tax was the same, in substance, as a tax of a specific sum upon the franchises and privileges of the bank, irrespective of the character of its investments, or, to use the language of Chief Justice Denio, in Utica *vs.* Churchill, 33 N. Y., 240, a tax "like that annexed to the franchise as a royalty for the grant," and notwithstanding the form of the tax appears to have been specially devised to obviate the objections sustained in the case of The Bank of Commerce *vs.* The Commissioners.

There is nothing in the case of The Society for Savings *vs.* Coite, 6 Wallace, 594, to indicate that the majority of the court by which it was decided intended to question the authority of the cases in 2d Black and 2d Wallace; although no less than three of the judges dissented from their conclusion.

It was there held, that a statute of a State requiring savings societies authorized to receive deposits, but without authority to issue bills, and *having no capital stock or stockholders*, to pay annually into the State treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property.

The majority of the court, while admitting that the tax would have been unconstitutional, as to deposits invested in United States securities,—if it could be considered a tax on the property represented by such securities,—held, that it was not a tax on the property, but on the franchises or privileges of the defendant corporation. The facts of the corporation having no capital stock (its charter authorizing it to improve deposits for the benefit of its depositors) of its investments really belonging to its depositors, and of the tax being assessed not upon the actual value of the deposits, were all considered as showing that the tax was not imposed on the property, but on the functions, franchises or corporate privileges of the defendant.

The succeeding case of The Provident Institution *vs.* Massachusetts, 6 Wallace, 611, is to same effect, and is marked by the same dissent of three members of the court.

But, conceding to the fullest extent the authority of these cases, they do not tend to prove that a tax on the gross receipts of a transportation company is not a tax upon transportation, nor that a tax upon inter-State transportation is not a tax upon, and a regulation of, inter-State commerce.

That the tax upon the gross receipts of railroad, canal and transportation companies, imposed by the Pennsylvania statute, was intended to be a tax upon their franchises, can hardly be asserted in face of the fact that all other incorporated companies are taxed upon their net earnings or income. The value of a franchise depends upon the profit derived from it; and the gross receipts of a railroad or canal company are not the measure of the profit made. But, in truth, the question is not, whether a tax which is alleged to operate as a regulation of commerce between the States or with foreign nations, is or is not a tax upon

persons, property, trades or occupations, but whether it does really operate as a regulation of such commerce; since it is practically impossible for any State to collect a tax except from persons or property within her territory. It was contended that the tax upon importers in Brown *vs.* Maryland, 12 Wheat., 419, was not a tax upon imports, but upon a business or occupation carried on in Maryland; that the tax on bills of lading in Almy *vs.* California, 23 How., 169, was a stamp tax, and not a duty on exports; and it might have been, and probably was, urged in Hays *vs.* The Pacific Mail Steamship Company, 17 How., 596, that the State of California had an undoubted right to tax ships as well as all other property within her territory. In Crandall *vs.* Nevada, 6 Wallace, 36, the tax chargeable against the carriers of passengers leaving the State was defended as a tax upon the business of carriers within the State.

When the court decided, in The Savings Society *vs.* Coite, and in The Provident Institution *vs.* Massachusetts, that the taxes there in question were charged upon the business of the corporation, and not upon their property, the unexpressed premise of the argument no doubt was, that such taxes did not practically interfere with the power of the United States to borrow money,—just as in Nathan *vs.* Louisiana, 7 How., 505, a State tax on exchange and money brokers was held not to interfere with the power of Congress to regulate commerce. "Under the law," said Mr. Justice McLean in the last-mentioned case, "every person is free to buy or sell bills of exchange as may be necessary in his business transactions, but he is required to pay the tax if he engages in the business of a money or exchange broker." But can it be said that the power of Congress to regulate commerce between the States, and its actual regulation of it by leaving it free and unrestricted, are not interfered with by a State regulation which exacts a certain sum for every passenger and every bale of goods that cross her boundary? or can it be reasonably said that every person is free to pass or repass, or to send his goods, without being taxed, provided he does not use the railroads or canals of the State?

But, as this question of State taxation of inter-State commerce is fully presented in several other cases now pending before the court, it is unnecessary to enlarge upon it in this brief; in fact, the thorough discussion contained in the opinions of the eminent judge, by whom this and the tonnage tax cases were originally decided, seems to have exhausted the subject.

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For Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Writ of Error to the Supreme Court of Pennsylvania.

The Philadelphia and Reading Railroad Co.,
PLAINTIFF IN ERROR.

vs.

The Commonwealth of Pennsylvania,
DEFENDANT IN ERROR.

Paper Book of the Defendant in Error.

LEWIS WALN SMITH,
F. CARROLL BREWSTER,
For Defendant in Error.

Supreme Court of the United States.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

NO 857, DECEMBER TERM, 1870.

THE PHILADELPHIA AND READING RAILROAD COMPANY.

Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

PAPER BOOK OF DEFENDANT IN ERROR.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State of Pennsylvania, which was alleged to be repugnant to the Constitution of the United States.

ABSTRACT OF THE CASE.

On the twenty-third day of February, 1866, the Legislature of Pennsylvania passed an act, entitled "An Act to amend the revenue laws of the Commonwealth," the second section of which is as follows:

"In addition to the taxes now provided for by law, every railroad, canal and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth *a tax of three-fourths of one per centum upon the gross receipts of said company;* the said tax shall be paid semi-annually, upon the first days of July and January, commencing on the first day of July,

1866; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of said company, to transmit to the Auditor General, at the dates aforesaid, a statement, under oath or affirmation, of the amount of gross receipts of the said company during the preceding six months; and if such company shall refuse or fail, for a period of thirty days after such tax becomes due, to make said return or to pay the same, the amount thereof, with an addition of ten (10) per centum thereto, shall be collected for the use of the Commonwealth, as other taxes are recoverable by law from said companies." (Act February 23, 1866, sec. 2; Purd. Dig. Supl., page 1554, pl. 2.)

Under this act a settlement was made against the plaintiff in error for the half year ending December 31, 1866. The plaintiff paid the Commonwealth the tax on that portion of their gross receipts derived entirely from transportation of goods intended to be delivered within the State. They refused to pay the tax on that portion which was derived from transportation *intended* to be transported without the State. It is from a judgment for this amount that the writ of error to this court was taken.

BRIEF OF ARGUMENT.

The plaintiffs in error contend that that portion of the gross receipts of a corporation, which may happen to be derived from goods intended for transportation beyond the State, are not liable to the same tax as the gross receipts of the company derived from traffic entirely within the State. That the tax of $\frac{3}{4}$ of one per cent. on the gross receipts of a railroad company, levied at the end of every six months, and charged equally on all the gross receipts derived from every source, constitutes an unconstitutional regulation of commerce so far as it taxes the gross receipts derived from inter-State traffic. Every argument in favor of the constitutionality of the tax on tonnage (argued already before the court) applies with equal force to the present case. As the defendant has stated fully her points in the brief filed in that case, she will not burden the attention of the court by reiteration. She would, therefore, respectfully call the attention of the court to the reason there given in favor of the constitutionality of the tax.

There are, however, some other points involved in the present case, which are even stronger in their force as to the constitutionality of the act of February 23, 1866, than those which apply to the act of August 25, 1864. The plaintiffs concede that if the latter act is constitutional then the former one is so also. In the tonnage tax case they contended that because the tax was levied on the corporation according to each ton carried, and they were thus enabled to know how much to add to the price of transportation of each ton, in order to keep up their profits, therefore, the tax was a regulation of commerce and void. But in the present case they go a step

further. The tax on gross receipts is levied on the corporation, to be paid out of the money derived from all transportation. They now say that because the money was received for foreign traffic, therefore that money cannot be considered the property of the corporation for the purposes of taxation. Some mystical property attached to the money derived from inter-State traffic, which exempts it from all liabilities to which other moneys are subjected. This doctrine is a novel one, and the research of counsel fails to discover a single case in all the decisions of either Federal or State judiciary, which has gone to the length now claimed. There is not an authority cited in support of so alarming a proposition. For if the gross receipts of a company cannot be taxed because they are derived originally from inter-State traffic, then the income cannot be taxed, nor the dividends, nor the assets, for the same line of argument will exempt the one as exempts the other.

In order, however, to reply to the argument of the plaintiffs as briefly as possible, the defendant contends—

First. That the tax of $\frac{3}{4}$ of one per cent. on all gross receipts of a transportation company is not a tax on property, but on the franchises of the corporation.

This same point came before this court in the case of the *Savings Society vs. Corte*, 6 *Wallace*, 594, and in *Provident Institute vs. Massachusetts*, 6 *Wallace*, 611. The identity between the taxes, so far as their effect on the corporations were concerned, will be noticed at once. We have quoted so fully from those cases on pages 35, 36 and 37 of the tonnage tax case, that we would respectfully refer to them as citing the points in the defendant's favor. The tax being, therefore, on the franchises of the corporation, and not on the property, it is clearly not included in the prohibited regulation of commerce, even according to the claims of the plaintiffs in error.

But the defendant contends—

Second. That even if the tax on gross receipts be considered as a tax on property, it is still entirely within the power of the State to so tax.

In the case of *Woodruff vs. Parham*, 8 *Wallace*, 123, this position was sustained. In that case the State levied a tax on the gross sales of an auctioneer. He claimed that these sales, which were of goods in unbroken packages from other States, were exempt. The court decided they were taxable. Our citations on pages 40, 41, 42, 43 and 44 of the Commonwealth's paper book, in the tonnage tax case, give their portion of the opinion, relied upon in the same effect is *Hinson vs. Lott*, 8 *Wallace*. These cases establish this, as far as adjudication can establish anything, that the States have a right to tax the gross receipts of a citizen transacting business, be the receipts derived from what source soever, and that such a tax is not unconstitutional, provided that the tax does not institute any

discrimination against non-residents. The rulings in the cases cited entirely cover this case.

The only case even having a tendency to sustain the plaintiff's claim, is that of *Brown vs. Maryland*, 12 *Wheaton*, 419. But even that case will not help them. The tax there was levied on the unbroken packages of imported goods, and itself concedes that there can be no exemption after commingling with the other property of the citizen. As was said by Mr. Justice Clifford, in *Warring vs. The Mayor*, 8 *Wallace*, 122, when explaining the decision in *Brown vs. Maryland:* "But the court admitted that whenever the importer had so acted upon the thing imported, that it became incorporated and mixed with the mass of property in the country, it must be considered as having lost its distinctive character as an import, and as having become subject to the taxing power of the State." Now, in the present case, by the end of every six months, when the tax is due and payable, the gross receipts have been expended in repairs, bridges, etc., or declared in dividends. They have commingled with the mass of property and have lost any distinctive features, even had they ever possessed any. For practically the tax on gross reseipts is a tax on the corporation, payable out of the net earnings. For the gross receipts are devoted to either expenses, as improvements, running expenses, etc.; and the balance retained as net earnings, and out of this balance the tax must be taken. The meaning of the decision in *Brown vs. Maryland*, is also laid down with great clearness in *Hinson vs. Lott*, *Supra.* The court said: "But if this were otherwise, and we could hold that as to such articles, the rule laid down in *Brown vs. Maryland*, concerning foreign imports applied, it would prevent but little of the evil we have described, for under the decision in that case, it is only while the goods so imported were held in the original unbroken condition in which they came into the State, and in the hands of the first importer, that they could be protected from State taxation, as soon as they passed out of his hands into use, or were offered for sale among the community at large, they would be liable to a tax which might render their use or sale impossible." So that *Brown vs. Maryland* will not meet the necessities of this case.

The plaintiff in error says: "That the tax upon the gross receipts of railroad, canal and transportation companies, imposed by the Pennsylvania statute, was intended to be a tax upon their franchises, can hardly be asserted in face of the fact that all other incorporated companies are taxed upon their net earnings or income. The value of a franchise depends upon the profit derived from it; and the gross receipts of a railroad or canal company are not the measure of profit made." The greater portion of the revenues of Pennsylvania are derived from the taxes levied on corporations. There are various forms of these taxes. In some cases they are levied on

the capital stock, in others on net earnings or income, in others gross receipts, and yet again some are charged on tonnage. The Commonwealth adapts the form of the tax to the particular kind of corporation, so that its collection can be facilitated. Practically there is an equitable distribution of the burdens among all classes, but, were it not so, there is nothing in the Constitution of the State which requires equality of taxation. Experience has shown her that it is better to charge a mining company three per cent. on net earnings, and to charge a railroad company three-fourths of one per cent. on gross receipts. She does so because it is expedient, but the fact that gross receipts are taxed in one case and net earnings in another, does not show that in one case it is a tax on franchise and in the other a tax on property. The reason why she selected the gross receipts as a basis of taxation of a railroad company, (if we my be permitted to suggest a reason for legislative action,) was doubtless because she found that a large number of railroads were expending their receipts in improvements, and charging these as expenses. The cost of every improvement was deducted from the "net earnings," and while thus enriching themselves they were avoiding taxation. She, therefore, takes a low percentage on the gross receipts, and taxes the same, whether they are expended in improvements or declared as a dividend. Such a course is both just to the corporation, and politic on the part of the State.

The defendant contends that even should the court be of the opinion that "tonnage tax" was unconstitutional, yet such a decision will not carry with it a like decision of the gross receipt tax, the one being entirely distinct from the other, and the latter even stronger in favor of the Commonwealth than the former.

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